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Public Law 137, 84th Congress, 1st Session, effective January, 1956 9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No.

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above entitled case on March 27, 1956.

CITATIONS TO OPINIONS BELOW.

The order of the trial Court is unreported and appears at Tr. 64. The opinion of the Circuit Court of Appeals is as yet unreported and appears attached hereto as Appendix A.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 27, 1956 (R. 79, Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether a combination of football club corporations and partnerships, an association composed of said corporations and certain individuals alleged to have perpetrated a boycott against petitioner, which prevented him from playing or coaching football with the National Football League and others, are exempt from the application of the Sherman Antitrust Act because football is a team sport?

2. Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the antitrust laws and injury thereby?

STATUTES INVOLVED.

The statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 and Section 4 of the Clayton Act, 15 U.S.C. Sec. 26. These are printed and attached hereto as Appendix C.

STATEMENT.

Petitioner's complaint was filed on July 5, 1949 (Tr. 3-18). The complaint alleges that defendants, the various teams in the National Football League, the league itself, and individuals attempted to monopolize interstate commerce in the business of professional football (Tr. 7-10). The defendants, it was alleged, tied football players to a particular member club and prevented players from becoming free agents by means of a reserve clause and a blacklist. These devices, it was alleged, prevented the player from obtaining competition among the member clubs for his services, or from being able to play for competitive organizations for fear of being never again able to play for respondents (Tr. 10). Petitioner commenced his career with the Detroit Lions of the National Football League (Tr. 10). Petitioner, it was alleged, had dire necessity to be able to play football in Los Angeles where his father became seriously ill in July 12, 1945 (Tr. 13), but was met with an ultimatum that he return to Detroit and could not play for the Los Angeles Rams of the National Football League (Tr. 13-14). Consequently, petitioner commenced playing for a team in a competitive league, the All-America

Conference, the Los Angeles Dons (Tr. 14). But when he attempted to seek employment as a player coach in San Francisco with a team associated with the Pacific Coast League, the San Francisco Clippers, alleged by respondents to be independent of the National Football League (Tr. 37-39), an organized boycott between this league and the National Football League prevented the completion of the contract (Tr. 14-15). Petitioner subsequently was unable to play or coach for any team of the National Football League or Pacific Coast League. (*id.*)

The answers of the defendants' reply to the allegations of interstate commerce are in the mold and language of *Federal Baseball Club v. National League,* 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (Tr. 24-28). They admit the uniform and cooperative imposition of a standard reserve clause on football players and admit that if a player violates this reserve clause he automatically cannot play National League football for five years (Tr. 28-30, 35). The reserve clause in question binds the player not to sign a contract with or play for any club other than the club which originally employed him or its assignee (Tr. 10).

On April 30, 1954 the complaint was dismissed on authority of *Toolson v. New York Yankees,* 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (Tr. 64) and the judgment (Tr. 69) was upheld by the Circuit Court of Appeals for the Ninth Circuit on the following grounds: (1) That football is a team sport as is baseball and therefore reasonably entitled to exemption from the antitrust laws. (2) That the Court cannot

discover any basis, without search or speculation, that the complaint shows the public interest is affected by the allegations of the complaint; and (3) that the Court cannot discover that the imposition of a uniform player contract by agreement of all clubs, which ties every football player in the league to a particular club in perpetuity on option of the employer and which prevents him from playing with competitive organizations on fear of blacklisting and boycotting, is a means which may restrain interstate commerce or is prejudicial to the public.

The Circuit Court of Appeals thus did not, in ruling on a judgment affirming the dismissal of a complaint, discuss whether or not the complaint stated violations of the antitrust laws. It chose, rather, to attempt if it could discover, without an examination of the violations charged, a prejudicial effect on the public. Failing in such search, it prevented petitioner from obtaining a trial by jury under Section 4 of the Clayton Act, Appendix C herein.

REASONS FOR GRANTING THE WRIT.

I.

IN ASSUMING THAT PROFESSIONAL FOOTBALL IS EXEMPTED FROM THE ANTITRUST LAWS THE COURT HAS DEPARTED FROM THE COMMAND IN U. S. v. INTERNATIONAL BOXING CLUB OF N.Y., THAT THE COURTS CANNOT IMPLY EXEMPTIONS FROM THE ANTITRUST LAWS.

Petitioner respectfully states that the Court below cannot imply a legislative exemption for organized professional football in view of this Court's very

recent ruling that the federal Courts cannot imply exemptions under the antitrust laws for any organization. At page 3 of the Circuit Court of Appeals for the Ninth Circuit's opinion, it was stated:

> "Further, it appears reasonable to us to assume that if Congressional indulgence extended to and saved baseball from regulation, then the indulgence extended to other team sports."

But in *U. S. v. International Boxing Club of N. Y.*, (1955) 348 U.S. 236, 244, 75 S.Ct. 259, 263, 99 L.Ed. 290, 296, this Court stated as to organized boxing:

> "Yet the defendants in the instant case are now asking this Court for the same exemption which enactment of these Bills would have afforded Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated."

The basis of the *International Boxing* decision, it would seem, is that the Courts cannot exempt any business, trade or sport from the antitrust laws which must be viewed with respect to their interstate activities; that is, whether they are in interstate commerce or their activities affect interstate commerce. The allegations as to interstate commerce in petitioner's complaint are in the same cast and mold as are those allegations of interstate commerce used by the U.S. in *The Boxing Case,* supra, and set forth at pages 348 U.S. 238, 239 of this Court's opinion. Petitioner herein has averred, as did the government, that defendants (each it is noted is located in different sections of the United States) make substantial utilization of

the channels of interstate trade and commerce, to-wit: that respondents negotiate contracts with nation-wide broadcasting and television companies, that respondents obtain substantial remuneration from said receipts, that there is constant and continuous travel across state lines, and that respondents sent blacklists throughout the country (Tr. 9-10, 25). Even the answers of the defendants add elements to the action which were pleaded in the *Boxing* case, to-wit: they lease football stadiums throughout the United States, they arrange interstate schedules for both non-league and league games, and they suspend players for five years throughout the United States on violation of the reserve clause, which means players cannot play at these stadiums pursuant to the interstate scheduling (Tr. 24-30).

It is manifest that the decision below is in direct conflict with *U.S. v. International Boxing Club,* supra, and *U.S. v. Schubert,* (1955) 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279, where the making and performing of contracts throughout the United States and the transmission of communications through interstate channels was held to subject the United Booking Office and others to the application of the Sherman Act. See also *U.S. v. Employing Plasterers Assoc.,* 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618; *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328; *U.S. v. Women's Sportswear Mfrs. Assoc.,* 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805; *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145.

II.

IN RULING THAT THE COMPLAINT MUST SET FORTH ALLEGATIONS SHOWING "PUBLIC INJURY" THE COURT HAS DEPARTED FROM ACCEPTED TRADITION AND IS IN CONFLICT WITH THE GENERAL RULE THAT A PRIVATE PARTY NEED ONLY ALLEGE VIOLATION OF THE ANTITRUST LAWS AND INJURY THEREBY.

It is submitted that prior to 1950, *Fedderson Motors, Inc. v. Ward* (10th Cir., 1950), 180 F. 2d 519, on a review of a motion to dismiss, that once it was established defendants were not exempt from the antitrust laws and that allegations of interstate commerce were sufficient, that the Court would next determine if the complaint alleged violations of the antitrust laws. This is all that Section 4 of the Clayton Act says it should do (Appendix C herein).

> "That any person who shall be injured in his business or property by reason of *anything forbidden in the antitrust laws*. . . ." (Emphasis added.)

The *Fedderson* case, however, establishes an additional requirement that the complaint convince the Court of an inherent prejudice to the public. But the great and overwhelming weight of authority since 1890 has held that the only requirements for a private person under this section to state a cause of action are (1) to allege violations and (2) to allege injury thereby.

As early as 1907 the 3d circuit stated in *Wheeler Stenzel Co. v. Nat'l Window Glass Jobbers Ass'n*, 152 Fed. 864, 874, to-wit:

"It is manifestly the correct understanding of the seventh section of the act that where a man is harmed in his business or property by a violation of the act, he has suffered a legal injury and is entitled to his action therefor."[1]

And the 1st Circuit in *Albert Peck Barth Co. v. Mitchell Woodbury Corp.*, 57 F. 2d 96, in 1932 stated:

"To constitute an offense under Section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate commerce, to show the public was affected and to what extent."

And in *Monarch Tobacco Works v. American Tobacco Co.*, the Circuit Court in Kentucky stated in 1908, 165 Fed. 774, 777:

"All that is necessary to support the action is that business or property of the complainant shall have been in some way injured by reason of the illegal scheme."

And the 2nd Circuit in *Gardella v. Chandler*, 172 F. 2d 402, held in 1949 that a baseball player was entitled to a trial by jury under the Sherman Act when the

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[1]Sec. 7 of the Sherman Act was repealed by Public Law 137, 84th Congress, 1st Session, effective January, 1956. It read as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

baseball league prevented the plaintiff from obtaining employment in its ranks after a flight to Mexico. It is noted that petitioner here was prevented from obtaining employment with a club alleged by defendants to be wholly independent of them (Tr. 37-39). See also *Ring v. Spina,* (2d Cir., 1945), 148 F. 2d 647, 186 F. 2d 639, cert. denied, 341 U.S. 935, 71 S.Ct. 854, 95 L.Ed. 1363; *Marinielli v. United Booking Offices of America,* (D.C. S.D. N.Y., 1914), 227 Fed. 165.

It is manifest that the instant opinion of the Ninth Circuit in conjunction with *Fedderson Motor Co. v. Ward,* (10th Cir., 1950) 180 F. 2d 519, raises a conflict in the circuits which ought to be settled by this Court.

The precise issue is whether or not a private party under Section 4 of the Clayton Act has stated a good and sufficient cause if he alleges violation of the Act and injury thereby. It is submitted that a pleaded and proven violation of a statute enacted to protect the public and legislated for its protection would, in logic and justice, be sufficient unto itself. The *Fedderson* case, *ibid.*, relies on *Shotkin v. General Electric Co.* (10th Cir., 1948), 171 F. 2d 236, but the *Shotkin* Court only stated at 239, in an action *pro se,* that the complaint "must contain general allegations from which it could be determined as a matter of law that the defendants did in fact violate the act with resulting damages to plaintiff." It, in turn, relied on *Glenn Coal v. Dickinson* (4th Cir., 1934) which, indeed, held at 72 F. 2d 885, 887:

> "To recover, the plaintiff must establish two things: (1) a violation of the Anti Trust Act and

> (2) damages to the plaintiff proximately resulting from the acts of the defendants which constitute a violation of the Act."

Thus it is respectfully asserted that the requirement of pleading "public injury" is a new doctrine which the Ninth and Tenth Circuits have seized upon, by use of dicta, to allow summary rejection of a complaint. It must further be asserted that the private antitrust action is now subject to a doctrine which, if not settled, will further add to the complications and scope of pleading and trial. It is a strained and illogical doctrine and a doctrine whose use is contrary to the statements in *City of Atlanta v. Chattanooga Pipe and Foundry* (6th Cir., 1903), 127 Fed. 23, 27, affirmed, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906) that:

> "Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to 'any person' injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act."

Roseland v. Phister, (7th Cir., 1942) 125 F. 2d 417, a landmark private action case, held a cause of action was stated by an agent of the defendant principal who conspired to deprive him of his job opportunities.

That the circuits are in clear conflict over the new doctrine of public injury may be seen in *National*

Used Car Market Report, Inc. v. National Auto Dealers Association, et al., (1952) 200 F. 2d 359, 360, where the 2nd Circuit stated:

> "We think it might be determined as a matter of law that the broad trade boycott here alleged is reasonably calculated to prejudice the public interest. However that may be, we think it is not necessary to make specific allegations of proof of public injury in order to show that a trade boycott of such breadth violates the Sherman Act."

Thus the Second and Ninth Circuits are clearly split on a complaint containing allegations of trade boycott.

III.

IN FAILING TO FIND "PUBLIC INJURY" INHERENT IN THE COMPLAINT CHARGING A CONSPIRACY TO BOYCOTT, THE COURT DEPARTED FROM THE ACCEPTED DOCTRINE THAT RESTRAINTS ON THE RIGHT TO PRACTICE A CALLING INHERENTLY INVOLVE THE PUBLIC INTEREST AND GOOD. EACH ALLEGATION OF VIOLATION OF THE ANTITRUST LAWS ESTABLISHES ILLEGALITY AND INHERENT PUBLIC INJURY.

It is respectfully submitted that an examination of the allegations of violations of the antitrust laws in petitioner's complaint, and the persuading reasons for their illegality, would lead to no other conclusion than that the complaint alleges violations of the antitrust laws which have inherent adverse effect on the public. The complaint alleges the following violations of the Sherman Act: (1) respondents attempted by unlawful combination and contract to control, regu-

late and dictate the terms upon which organized professional football shall be played throughout the United States (Tr. 9). This Court has repeatedly held that any combination or association of individuals who surrender their individuality to an association and create, in the process, an extra governmental agency whose purpose is to control competition, is illegal. *U. S. v. Associated Press,* (1945) 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013; *Fashion Originators' Guild v. Federal Trade Commission,* (1941) 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949. The inherent evil to the public of a combination of individuals into an association with monopoly power is fundamental to the Acts' enactment. *Standard Oil Co. of New Jersey v. U. S.,* (1911) 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619; *U. S. v. Terminal Railroad Ass'n. of St. Louis,* (1912) 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810; *U. S. v. South-Eastern Underwriters Ass'n.,* (1944) 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440; *U. S. v. Griffith,* (1948) 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236; *U. S. v. Socony Vacuum Oil Co.,* (1940) 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *U. S. v. Corn Products Refining Co.,* (S.D.N.Y., 1916) 234 Fed. 964; *U. S. v. Aluminum Co. of America,* (2d Cir., 1945) 148 F. 2d 416. The evils of a monopoly pool of capital and uniform association rules which provide exclusive rights to player talent and provide uniform blacklisting conditions are not different when applied to a sport than applied to any other type of business.

(2) Respondents adopted uniform players' contracts, containing reserve clauses, published by the

National League (Tr. 10). The uniform adoption of industry regulatory contracts are in violation of the antitrust laws. *U. S. v. Associated Press*, supra, *Fashion Originators' Guild v. Federal Trade Commission*, supra. As was stated by Justice Black in the *Guild* case, 312 U.S. 457, 466; 61 S.Ct. 702, 707; 85 L.Ed. 949.

> "Petitioners, however, argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out a limited production, or brought about a deterioration in quality. But action falling into these three categories does not exhaust the type of conduct banned by the Sherman and Clayton Acts. For as this Court has said, 'Trade or commerce under these circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to the altered surroundings. Mere reduction in price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all powerful combination of capital.' *U. S. v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 323; 17 S.Ct. 540, 552; 41 L.Ed. 1007."

As was stated in *Ring v. Spina* (2nd Cir., 1945) 148 F. 2d 647, 650:

> "It is now well settled that a contract covering a large part of an industry will be void and illegal under the Sherman Act for such restrictive agree-

ments and that these constitute adequate proof of a combination in restraint of trade."

Attempts to obtain all first class performers and subject them to exclusive service was analyzed by Judge Learned Hand in *Marienelli, Ltd. v. United Booking Offices of America* (S.D. N.Y. 1914) 227 Fed. 165, 171, wherein he stated:

> "The necessary inference is that the defendants, if successful, will control all 'first class' performers and succeed in monopolizing the supply. This, in turn, enables them to control the whole business, and constitutes the very conditions which the Sherman Act means to prevent. If in execution of that project they injure the plaintiff, the resulting damages are within the seventh section of the act."

The inherent economic effect of uniform reserve clauses are to keep member clubs of the National Football League from competing for the price of talent, and to drive down, thereby, the player's salaries. Further, they prevent competitive clubs from obtaining needed talent. The first is a *per se* restraint of trade even though it involves the salaries of players. For as this Court said in an action involving salaries of real estate agents, *U. S. v. National Ass'n. of Real Estate Bds.* (1950) 339 U.S. 485, 489, 70 S.Ct. 711, 714, 94 L.Ed. 1007, 1012:

> "It is not for the courts to determine whether in particular settings price-fixings serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of

> consenual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve."

See also *American Medical Association v. U. S.* (1943) 317 U.S. 519, 63 S.Ct. 328, 87 L.Ed. 434; *Atlantic Cleaners & Dyers v. U. S.* (1932) 286 U.S. 427, 52 S.Ct. 607, 76 L.Ed. 1204.

The inherent tendency of exclusion of others in reserve clauses is equally a violation of the antitrust laws. *U. S. v. Schubert,* supra. In the *Associated Press* case this Court stated at 326 U.S. 1, 15, 65 S.Ct. 1416, 1422, 89 L.Ed. 2013, 2027,

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy and sell the things in which the group compete."

This exclusion was specifically applied in petitioner's complaint to the then competing All-America Conference (Tr. 16). Since said time this Conference has been merged with respondents. (3) That the respondents uniformly blacklist players who violate the reserve clause (Tr. 10). It is settled that a conspiracy to blacklist and/or boycott is a violation of the antitrust laws. *Fashion Originators' Guild v. Federal Trade Commission* (2nd Cir. 1940) 114 F. 2d 80, affirmed, 312 U.S. 456, 61 S.Ct. 703, 85 L.Ed. 949. The gravamen of this action is the conspiracy to boycott petitioner to prevent his playing with the Pacific Coast League in an effort to enforce industry-wide regulation.

(4) That the respondents forced petitioner to sign a reserve clause restraining his playing football for anyone else but one club for life and in effect throughout the U. S. and boycotted him on its violation (Tr. 11, 14-15). Assuming that all the above violations by respondents are in some way protected or exempt from the antitrust laws because of the necessity of competitive sports, the above allegations, even when applied to a single football player are in violation of the antitrust laws and *inherently cause public injury.* Petitioner's action is based on centuries of tradition which have held single restrictive restraints on occupation illegal as against public policy. The common law on the subject of restraints on occupations is set forth in great detail in *U. S. v. Addyston Pipe and Steel Co.* (6th Cir. 1899) 85 Fed. 271, by Justice Taft. It is settled that the antitrust laws incorporated the common law on restraints of trade, *U. S. v. Standard Oil of New Jersey,* supra.

The public policy of protecting the right to practice a calling free from monopoly restraints, so obnoxious to a free society, thus were incorporated into the antitrust laws and redress allowed by the United States Congress.

In *Oregon Steam Navigation Co. v. Winsor* (1874) 87 U.S. 64, 67, 22 L.Ed. 312, 318, this Court stated:

> "Of course, a contract not to exercise a trade generally would be obnoxious to the rule and would be void. * * *
>
> There are two principle grounds on which the doctrine is founded, that a contract in restraint

> of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry, the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when contract is general, not to pursue one's trade at all or not to pursue in the entire realm or country."

Thus the restriction on a right to practice a calling has inherent public injury, and a conspiracy to destroy this right, even though exercised against one individual, involves public injury. It would appear manifest that in an action involving restraints on the right to practice a calling, abhorrent to the common law[2] which became incorporated into our anti-trust laws; that there is breach of centuries of doctrine and Congressional protection of private rights should a Court prevent the action from going to a jury based on lack of allegations of public injury. A boycott against a man's right to practice a calling is coextensive with the public good. See *Roseland v. Phister,* 125 F. 2d 417. As the complaint specifies, the blacklist and boycott against petitioner has existed since 1948 and has prevented him from coaching as well as playing football (Tr. 15).

In the *Gardella* case, supra, Judge Jerome Frank stated at 409:

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[2]In the famous *Dyers* case, 2 Hen. V, 5 pl. 26 (1415), Dyer not to pursue his trade in a town for six months—the shocked English judge stated, "Per dieu, if the plaintiff were here, he should go to prison till he had paid a fine to the King".

"For the 'reserve clause' as has been observed results in something resembling peonage to the baseball player."

The decision of the Court below departs from the inflexible command of this Court that Congress is presumed to have exercised the full extent of its powers over interstate commerce in the enactment of the Sherman Act. *U. S. v. South-Eastern Underwriters Ass'n.* (1944) 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440. In its conclusion that an organization, individual clubs and private parties are exempted from the Sherman Act, the Court below has ruled clearly inconsistent with statements of this Court in the recent *Boxing* and *Schubert* decisions that exemption is a matter for Congress and not the Courts.

The doctrine of "public injury" departs from the certain and specific standard of searching the complaint for violations of the antitrust laws, and is inconsistent, thereby, with the principle heretofore shown as requiring the private suitor to allege only violations of the antitrust laws and injury thereby.

The doctrine of "public injury" is inconsistent with the same Court's emphasis on the requirement of "private injury". See *Wolfe, et al. v. National Lead Co., et al.*, 225 F. 2d 427, cert. denied, 350 U.S. 915, 76 S.Ct. 198, 100 L.Ed. 128 (a nonsuit case). For the private antitrust action is by its very nature an

action for private injury, and to subject it to a test of "public injury" apart from the violations charged creates in the judiciary an extraordinary power to prevent the action from reaching a jury. On the one hand, "private injury" is subject to a severe test of proof of injury. *Wolfe v. National Lead,* supra. But if the injury to the plaintiff be without doubt, the "private injury" is subject to a test that it involve "public injury", allowing a seesaw of legal doctrine to prevent the private litigant from reaching a jury. Further, the doctrine of public injury is used in a setting of express assumption of violation of the antitrust laws. Thus the action sponsored by Congress to enforce respect for the antitrust laws becomes subject to a judicial prerogative of preventing the action from reaching the jury in spite of assumed violation of the law. In *Wilkerson v. McCarthy* (1949) 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497, the grounds for the acceptance of the petition was based on the attitude of the Courts with respect to disallowing jury trials under the Federal Employers Liability Act, 45 U.S.C.A. 51-60.

The doctrine of allegation of "public injury" as used by the Court below is a vague, uncertain and indefinite doctrine, and allows the Courts to apply differing notions of what it considers inherent public injury without examination of the violations alleged.

Judge Taft in *U. S. v. Addyston Pipe and Steel Co.* (6th Cir. 1898) 85 Fed. 271 at 283-284 warned:

> "It is true that there are some cases in which the courts, mistaking, as we conceive, the proper

> limits of relaxation of the rules for determining the unreasonableness of the restraint of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not. The manifest danger in the administration of justice according to so shifting, vague and indeterminate standard would seem to be a strong reason against adopting it."

This Court has steadfastly refused to allow the antitrust laws to become "a sea of doubt" and the steady development of "per se" doctrines by this Court exhibits for all that it is contrary to antitrust enforcement policy to unduly extend the sphere of judicial prerogative in this field. *U. S. v. Socony Vacuum Oil Co.* (1940) 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *Fashion Originators' Guild v. Federal Trade Commission,* supra; *U. S. v. International Salt* (1947) 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20; *U. S. v. Griffith* (1948) 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236; *U. S. v. Paramount Pictures, Inc.* (1948) 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260.

The private antitrust action is a necessary part of Congress's war on illegal monopoly and restraints of trade. *Bruice's Juices v. American Can Co.* (1947) 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219.

Yet this enforcement action is now subject to a "sea of doubt" which ought to be, it is respectfully urged, charted by this Court. It is respectfully sub-

mitted that Congress intended to and gave private redress in the antitrust laws to a petitioner, such as herein, whose life and pursuit of happiness has been made subject to illegal monopoly and restraint of trade. A conspiracy to boycott an individual involving a *per se* violation of antitrust law has been allowed to escape with impunity and without judgment by his peers.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
May 14, 1956.

Respectfully submitted,
MAXWELL KEITH,
Attorney for Petitioner.

(Appendices A, B and C Follow.)